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No. 82-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PFEIFFER,

Petitioner,

v.

ESSEX WIRE CORPORATION, a Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether, in addition to the relief specifically authorized by the Age Discrimination in Employment Act of 1967 for violation of its provisions, which relief includes unpaid wages plus, in cases of willful violations, liquidated damages doubling that amount, an aggrieved person may also receive either damages for pain and suffering or punitive damages.

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BRIEF IN OPPOSITION TO CERTIORARI

STATUTES INVOLVED

The petition sets forth the text of Section 626(b) and (c) of the Age Discrimination in Employment Act of 1967 ("ADEA" or "Act"), as amended, 29 U.S.C. §§ 621-634. The petition does not, however, set forth Section 621 of the ADEA, which is involved, or Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), to which specific reference is made in ADEA Section 626(b) and which is also involved. These provisions are set forth in the Statutory Appendix at pages 1a-2a, *infra*.

COUNTERSTATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case, but adds the following:

After being discharged from Essex Wire Corporation ("Essex") on October 17, 1975, Petitioner was unemployed for a period of five weeks, during which time he received unemployment compensation benefits under the Illinois Unemployment Compensation Act. On December 4, 1975, Petitioner began employment with the Nabisco Company in Chicago. In his new position, Petitioner received greater remuneration—both in wages and pension benefits—than he would have received had he remained in Essex's employ. Pet. App. 2a, 10a.[1]

REASONS FOR DENYING THE WRIT

1. There Is No Conflict Among The Courts Of Appeals.

No court of appeals that has been presented with the question of the appropriate relief available to a plaintiff under the Age Discrimination in Employment Act of 1967—and there are now seven—has permitted either damages for pain and suffering or punitive damages.

The Court of Appeals for the Third Circuit in *Rogers* v. *Exxon Engineering & Research Corp.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), was the first court of appeals to address the issue. It held that damages for pain and suffering were not available to a claimant under the Act. It adhered to that decision in *Wehr* v. *Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980).

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[1] The petition will be cited herein as Pet. ____, and the appendix to the petition will be cited as Pet. App. ____.

Shortly after *Rogers*, the Court of Appeals for the Fifth Circuit in *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), held that neither damages for pain and suffering nor punitive damages could be awarded under the statute. *Accord Murphy* v. *American Motors Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (per curiam) (punitive damages are not recoverable).

The Court of Appeals for the Fourth Circuit held in *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979), that there could be no compensation under the statute for pain and suffering, and shortly thereafter, in *Walker* v. *Pettit Construction Co.*, 605 F.2d 128 (4th Cir. 1979), it adhered to this holding and held that punitive damages were not authorized under the statute.

Until the decision below, the question of punitive damages had not again reached a court of appeals, but prior to that decision the question of the availability of damages for pain and suffering had been decided in the negative by the Courts of Appeals for the First, Eighth, and Ninth Circuits. *Vazquez* v. *Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Fiedler* v. *Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Naton* v. *Bank of California*, 649 F.2d 691 (9th Cir. 1981). *See also Cancellier* v. *Federated Department Stores, Inc.*, 672 F.2d 1312 (9th Cir. 1982) (dicta).

The decision below, *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982), Pet. App. 1a, thus constitutes the seventh court of appeals decision refusing to read into the statute authority for damages beyond that for lost wages and, in cases of willful violations, an equal amount in liquidated damages. It held that neither damages for pain and suffering nor punitive damages could be awarded.

No court of appeals has held to the contrary, either with respect to damages for pain and suffering or punitive damages. Most of the federal district courts in the circuits that have not spoken on the issue have rejected claims for damages for pain and suffering under the ADEA.[2] Similarly, the district courts in such circuits have, for the most part, rejected claims for punitive damages.[3]

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[2] Since 1978, the following district court cases from those circuits that have not yet addressed the issue have rejected pain-and-suffering damages under the ADEA. Berry v. Gen. Elec. Co., 541 F. Supp. 800 (W.D. Ky. 1982); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57 (S.D.N.Y. 1981); Placos v. Cosmair, Inc., 517 F. Supp. 1287 (S.D.N.Y. 1981); Buchanan v. Gateway Int'l, Inc., 27 Fair Empl. Prac. Cas. (BNA) 1649 (D. Kan. Dec. 3, 1981); Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696 (S.D.N.Y. 1980); Friend v. Union Dime Savings Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307 (S.D.N.Y. Aug. 18, 1980); Ayres v. Federated Dep't Stores, Inc., 24 Fair Empl. Prac. Cas. (BNA) 528 (S.D.N.Y. Jan. 25, 1980); Douglas v. Am. Cyanamid Co., 472 F. Supp. 298 (D. Conn. 1979); Riddle v. Getty Refinery & Mktg. Co., 460 F. Supp. 678 (N.D. Okla. 1978); Dunwoodie v. Chrysler Co., 459 F. Supp. 971 (E.D. Mich. 1978); Seider v. Canada Dry Corp., 18 Fair Empl. Prac. Cas. (BNA) 1786 (S.D.N.Y. April 11, 1978).

Only four district court cases decided in those circuits since 1978 have permitted pain-and-suffering damages. Wise v. Olan Mills, Inc., 485 F. Supp. 542 (D. Colo. 1980); Pavlo v. Stiefel Labs, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489 (S.D.N.Y. Nov. 20, 1979); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979); Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978).

Additional district court cases cited for this proposition at page 7 of the petition preceded the contrary decisions of the courts of appeals for their circuits.

[3] The following district courts in those circuits that have not yet spoken on the issue have refused to permit punitive damages under the ADEA. Boddorff v. Publicker Indus., Inc., 488 F. Supp. 1107, 1114 (E.D. Pa. 1980); Douglas, 472 F. Supp. at 303-04; Riddle, 460 F.

2. The Decision Below Is Correct.

The ADEA does not purport to authorize damages for pain and suffering or punitive damages. Instead, with certain enumerated exceptions discussed below, Section 626(b) expressly incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. *See Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978).[4] That statute created a private right of action to recover unpaid minimum wages and an additional amount as liquidated damages. 29 U.S.C. § 216(b). It also provided for criminal penalties for FLSA violations. 29

Supp. at 679-80; Dunwoodie, 459 F. Supp. at 973; Wagner v. Sperry Univac, 458 F. Supp. 505, 518 (E.D. Pa. 1978), *aff'd mem.*, 624 F.2d 1092 (3d Cir. 1980); Gifford, 458 F. Supp. at 464; Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 218 (D. Colo. 1977); Looney v. Commercial Union Assurance Co., 428 F. Supp. 533, 536-37 (E.D. Mich. 1977); Fellows v. Medford Corp., 431 F. Supp. 199, 202 (D. Or. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329, 1336-37 (E.D. Pa. 1976).

Only two cases in those circuits have allowed punitive damages. Wise, 485 F. Supp. at 545; Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008 (D. Colo. 1980). In light of the decision below, the case of Karijolic v. Illinois Bell Telephone Co., 19 Fair Empl. Prac. Cas. (BNA) 447 (N.D. Ill. Oct. 26, 1977), cited at page 7 of the petition, is no longer the law in the Northern District of Illinois.

[4] There, this Court noted the close relationship between the FLSA and the ADEA enforcement provisions in holding that since the FLSA provided for a jury trial on the issue of unpaid wages, the ADEA litigant was also entitled to a jury trial on the issue of lost wages. The Court observed:

> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA. Senator Javits, one of the floor managers of the bill, so indicated

U.S.C. § 216(a). It has no provision for damages for pain and suffering or punitive damages, and this Court has held that punitive damages are not recoverable for violations. *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572, 582-84 (1942). While this Court has not had before it the issue of whether pain-and-suffering damages are recoverable under the FLSA, no court of appeals has permitted such damages. *See Martinez* v. *Behring's Service, Inc.*, 501 F.2d 104, 105 (5th Cir. 1974); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959); *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir. 1949).

Congress was undoubtedly cognizant of the limitations on FLSA remedies recognized by the foregoing cases that had already been decided when it adopted the ADEA in 1967, incorporating the FLSA remedial scheme.[5] For this reason, any claim by Petitioner for pain-and-suffering or

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in describing the enforcement section which became part of the Act: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 CONG. REC. 31254 (1967).

434 U.S. at 582.

[5] As this Court stated in *Lorillard:*

> So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

434 U.S. at 581.

punitive damages must arise from one of the changes made by Congress when it altered the remedial provisions of the FLSA to obtain the final version of the ADEA.

The change urged by Petitioner (Pet. 7) as giving rise to punitive and pain-and-suffering damages in the ADEA is the addition of the catch-all language, following the provisions for lost wages and liquidated damages, appearing in Section 626(b):

> In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[6]

This language is most sensibly read, however, to ensure that courts have full latitude to tailor the terms and conditions of relief specified by the statute—reinstatement, promotion, employment, or judgments for lost wages and liquidated damages—to the particular facts of a given case. *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

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[6] The two other changes made by Congress in the remedial provisions of the FLSA when adopting the ADEA were the elimination of the criminal penalty contained in Section 216(a) for willful violations and the limitation of liquidated damages to those cases where plaintiffs can prove a willful violation of the Act. This latter change in effect shifted the burden of proof from defendants to plaintiffs for the purposes of obtaining liquidated damages. *See* 29 U.S.C. § 260.

The purposes of the ADEA, as codified at Section 621(b), are to promote employment, prohibit discrimination, and help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b). As found in Section 621(a)(3), Congress was concerned that members of the protected group might be without gainful employment. Precisely because of this concern Congress specifically authorized the courts to order reinstatement, employment, or promotion. The express Congressional remedies—payment of lost wages, doubled when violations are willful, plus court-ordered employment or reinstatement—were presumably believed adequate to address the problem of inability to secure employment. *Rogers* v. *Exxon Engineering & Research Corp.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). As there stated, "Congress might well have believed that the resumption of productive work removes the rest of the emotional anxiety and monetary deprivation which occurred in the interim is restored by an award for the actual loss." *Id.*[7]

Petitioner also relies on Section 626(c) as granting remedies under the Act. As noted by the court below, however, Section 626(c) is no more than a jurisdiction-granting section and is not an independent source of

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[7] It is ironic that Petitioner should claim license for compensatory recovery on the basis of Congress's concern over long-term unemployment since in fact Petitioner found another, better paying job shortly after he left Respondent's employ with the result that he experienced minimal financial loss. The jury verdict herein of $182,259 is precisely the kind of unwarranted recovery that was a legitimate concern of the Third Circuit in *Rogers* and, it may be inferred, that led Congress to limit the scope of relief available under the ADEA.

remedies under the statute. *Pfeiffer*, 682 F.2d at 685 n.1, Pet. App. at 3a-4a; *Schlicke* v. *Allen-Bradley Co.*, 448 F. Supp. 252, 253 (E.D. Wis. 1978). *Cf. Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 (1979) (Section 27 of the Securities Exchange Act of 1934 merely grants jurisdiction to federal courts; it creates no cause of action and imposes no liabilities). The parallel provision in the FLSA, which appears in Section 216(b), 29 U.S.C. § 216(b), has not been held to justify this type of relief.

The legislative history of the original ADEA in 1967 does not discuss whether pain-and-suffering or punitive damages are available; as pointed out by the court below, 682 F.2d at 687, Pet. App. 7a-8a, however, the Conference Report with respect to the 1978 amendments[8], which, *inter alia*, specifically authorized a jury trial, shows that Congress assumed that such damages were not available. It stated:

> The ADEA as amended by this act does not provide remedies of a punitive nature.[9]

It also stated that

> liquidated damages . . . compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.[10]

The Conference Report was issued on March 14, 1978, which was subsequent to the Third Circuit's decision in *Rogers* (January 20, 1977) and the Fifth Circuit's decision in *Dean* (October 26, 1977). The Report was also issued

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[8] HOUSE CONF. REP. NO. 950, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528.

[9] *Id.* at 14, 1978 U.S. CODE CONG. & AD. NEWS at 535.

[10] *Id.* at 13, 1978 U.S. CODE CONG. & AD. NEWS at 535.

subsequent to the dates this Court denied petitions for certiorari in those two cases. Since no court of appeals had permitted damages for pain and suffering or punitive damages, it can safely be assumed that the legislators were aware of the *Rogers* and *Dean* cases and tacitly approved of their holdings. *See Lorillard* v. *Pons*, 434 U.S. at 581. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, ___ U.S. ___, 50 U.S.L.W. 4457, 4464 (May 3, 1982) (the fact that the amendment of the Commodity Exchange Act left intact statutory provisions under which federal courts had consistently implied a private right of action provided evidence that Congress intended that private right to survive).

The enforcement scheme contemplated by the ADEA also seriously undermines Petitioner's arguments. Prior to the institution of an action under the ADEA, administrative proceedings must be commenced by the filing of a charge with a representative of the United States Department of Labor so that conciliation may be effected under the auspices of the Department. 29 U.S.C. § 626(b). As pointed out in *Rogers*, 550 F.2d at 841,

> An entitlement to an award for pain and suffering without guidelines of any sort is a vague and amorphous concept traditionally found in a private lawsuit but is uncommon in administrative actions . . . .
>
> While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, it would also introduce an element of uncertainty which would impair the conciliation process . . . .
>
> The Act provides for determination of the amount of damages by an objective test—the amount of lost earnings. While the exact computation may be the subject of disagreement, that type of dispute is familiar to administrative proceedings and generally not difficult to resolve.

3. The Petition Does Not Present An Important Federal Question For Review By This Court.

The unanimity of the court of appeals decisions addressing the issue raised by Petitioner verifies that no important federal question is here presented. In this regard, it is significant to note that damages for pain and suffering and punitive damages are not available under a number of other federal labor statutes, such as Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (making illegal discrimination on the basis of race, sex, and national origin), and Section 10(c) and (e) of the National Labor Relations Act, 29 U.S.C. § 160(c) and (e) (allowing remedies for unfair labor practices),[11] which provide for various forms of equitable relief, including back pay. Presumably, Congress has not deemed the unavailability of such damages in those statutes as denying full relief to plaintiffs. Similarly, ADEA plaintiffs will not be deprived of relief intended by Congress because of the unavailability of those damages.

In urging that without such damages there will be no deterrent to willful illegal acts by employers in violation of the ADEA (Pet. 6), Petitioner ignores the purpose of the double damages as a liquidated penalty in the case of willful violations. And there is no danger that persons harmed by violations of the Act will be faced with difficulty in retaining counsel because of the lack of damages for pain and suffering and punitive damages, because a prevailing plaintiff under the Act may recover attorney's

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[11] *E.g.*, De Grace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980) (Title VII); Richerson v. Jones, 551 F.2d 918, 926 (3d Cir. 1977) (Title VII); International Union, U.A., A. & A.I.W. v. Russell, 356 U.S. 634, 642-43 (1958) (NLRA).

fees. *Rogers*, 550 F.2d at 842; *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

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Section 621 of the ADEA, 29 U.S.C. § 621 (1976), provides:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 216(b) of the FLSA, 29 U.S.C. § 216(b) (1980 Supp. IV), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promo-

tion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the actions. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.